No. 76-1143

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY MARSHALL, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

BARLOW'S, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

REPLY BRIEF FOR THE APPELLANTS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. We have urged that the Fourth Amendment does not require the Secretary of Labor to obtain a search warrant to conduct statutorily authorized inspections during regular working hours of the portions of commercial premises routinely occupied by an employer's work force. Our principal submission is that an employer has a diminished privacy interest in the areas of his workplace that he opens up to his employees and that the prerequisite of a warrant would frustrate the need for unannounced inspections while providing only negligible protections beyond those already afforded by the Act's inspection scheme. This balancing approach, in which the interests of the regulatory inspection are weighed against the possibilities of abuse and the threat to privacy, is the central element of the Court's pertinent Fourth Amendment jurisprudence. See, *e.g.*, *Camara* v. *Municipal*

Court, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541; *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72; *United States* v. *Biswell*, 406 U.S. 311.

As we have argued at greater length at pp. 41-47 of our opening brief, we believe that this case is governed by the analysis of *United States* v. *Biswell, supra*, in which the Court upheld a warrantless search of a locked commercial storeroom as part of a federal gun control inspection program. Appellee claims (Br. 36-40) *Biswell* is distinguishable because it involved inspection of the premises of "a dealer [who] chooses to engage in this pervasively regulated business and to accept a federal license" (406 U.S. at 316) while OSHA extends to all "businesses affecting interstate commerce" (29 U.S.C. 651(3)).

But *Biswell* does not turn on the narrow rationale that the Gun Control Act was directed at a single industry licensed by the federal government. The Court there emphasized the "pervasive" regulation of the firearms business and the federal licensing requirements of the Act as evidence that "inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy" (406 U.S. at 316). While those elements supported the conclusion that "the threat to privacy * * * [was] not of impressive dimensions" (*id.* at 317), these are not the exclusive means of demonstrating that a federal regulatory inspection may proceed without a warrant when specifically authorized by statute. The critical questions are whether warrantless regulatory inspections are needed to further an important interest and whether the proprietor of the premises has a privacy interest in the area and subject matter to be inspected that justifies the intervention of a judicial officer. In this respect, the scope of the congressional regulation is irrelevant; it may seek to deal

with a narrow problem applicable only to a particular industry or it may respond to a broader range of evils. But the breadth of the congressional regulation does not of itself create privacy interests that otherwise would not exist. Thus, the fact that OSHA is not directed to a particular federally licensed activity but encompasses all business subject to Congress' power to regulate interstate commerce does not serve to create reasonable expectations of privacy in areas that employers have already opened to their workers. See *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 51-52 (S.D. Ohio); *United States* v. *Del Campo Baking Mfg. Company*, 345 F. Supp. 1371, 1376-1377 (D. Del.).

Here, the very history of the matter shows that an employer has no reasonable expectation of privacy against regulatory inspection of his employees' workplace sufficient to invoke the warrant requirement. In enacting OSHA, Congress expressly recognized the "long-established statutory precedent in both Federal and State law to require employers to provide a safe and healthful place of employment." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 10 (1970), Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. 150 (1971) ("Leg. Hist."). As the Senate Report further observed (*ibid.*), "[o]ver 36 states have provisions of this type, and at least three Federal laws contain similar clauses, including the Walsh-Healey Public Contracts Act, the Service Contract Act, and the Longshoremen's and Harbor Workers' Act." See also H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 21 (1970), Leg. Hist. 851. These historical antecedents offer persuasive testimony that an employer has little realistic privacy interest in employee work areas vis-a-vis an inspection authorized by statute to protect the safety and health of the employees he has assigned to such areas.

The Occupational Safety and Health Act thus reflects an historical concern by both the federal and state governments that the Nation's workers are entitled to a safe and healthful environment to be enforced by on-site inspection. As in control of firearms, Congress has determined that "[l]arge interests are at stake, and inspection is a crucial part of the regulatory scheme" (406 U.S. at 315). The history of industrial safety regulation effectively refutes appellee's claim that it has any justifiable expectation of privacy—from statutorily authorized, and limited, regulatory inspections—in its employee work areas that would implicate the warrant requirements of the Fourth Amendment.[1]

2. Appellee alternatively argues (Br. 51-58) that if the Court concludes that the Fourth Amendment requires the issuance of a warrant as a prerequisite to an inspection under the Act, that such a warrant should be (Br. 51) "based on relevant probable cause standards." In appellee's view, "the inspector should be required to show, at a minimum, facts demonstrating that the statutory findings of present danger to safety and health of

[1]The Food and Drug Administration inspection decisions, upon which appellee relies (Br. 49-50), do not authoritatively support its claim that a warrant is required for an OSHA inspection. Each of those cases was decided prior to *Biswell* and does not take into account this Court's view that Congress can constitutionally adopt a warrantless "regulatory inspection system of business premises that is carefully limited in time, place, and scope" to be conducted pursuant "to the authority of a valid statute" (406 U.S. at 315). Since *Biswell*, the only decisions have rejected the argument that a Food and Drug Administration inspection requires a warrant. See *United States* v. *Del Campo Baking Mfg. Company, supra;* and *United States* v. *Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla.); cf. *United States* v. *Litvin*, 353 F. Supp. 1333 (D. D.C.).

employees apply to a reasonably relevant fact situation (*e.g.*, an industry-wide problem, an area health hazard, or specific complaints) directly affecting the business to be investigated" (Br. 55-56).

But the Court emphatically rejected much the same contention more than a decade ago in *Camara* v. *Muncipal Court, supra*. There, the petitioner urged that "warrants should issue only when the inspector [has] probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced" (387 U.S. at 534). In refusing to adopt a strict probable cause standard, the Court recognized that area code enforcement inspections have a long history of judicial and public acceptance, that an urgent public interest demands the abatement of unsafe conditions, and that because such inspections are neither personal in nature nor aimed at the discovery of crime, they involve a relatively limited invasion of the urban citizen's privacy (see 387 U.S. at 537). Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, the Court held that "it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (387 U.S. at 538).

There can be no doubt that the "general schedule" inspection at issue in this case would meet the standard of *Camara*. As we have pointed out in our opening brief (p. 9, n. 7, 37, n. 17), such inspections are carried out in accordance with objective criteria based upon accident experience and the number of employees exposed in particular industries; the inspected establishments are selected by area directors applying these criteria, not by the officers in the field. The essence of the general

schedule inspection is that it is a random spot check to establish enforcement of the Act on a representative basis. While the Secretary has also undertaken inspections on information that particular industries are especially hazardous,[2] as well as inspections in response to fatal accidents (29 C.F.R. 1904.8) and employee complaints of specific workplace hazards,[3] the general schedule inspection is needed to fulfull the congressional promise of assuring "every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. 651). As long as the Secretary can demonstrate a reasonable basis under the Act for selecting particular businesses or classes of businesses for inspection, the issuance of a warrant need not "depend upon specific knowledge of the condition of the particular * * * [workplace]," *Camara* v. *Municipal Court, supra,* 387 U.S. at 538. Accord, *e.g., Reynolds Metals Co.* v. *Secretary*, (W.D. Va.), Civ. No. 770215, decided October 13, 1977. Appeal pending C.A. 4, No. 77-0215.

3. Our principal contention remains, however, that the requirement of *Camara* and *See* that warrants be utilized in administrative compliance inspections, is limited to situations giving rise to the concerns there expressed by the Court—situations where a significant justifiable privacy expectation is involved, where occupants are subject to

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[2]See, *e.g., Marshall* v. *Chromalloy American Corp.*, E.D. Wis., No. 77-C-291, decided July 12, 1977, appeal pending, C.A. 7, No. 77-1744 (showing OSHA inspection was sought to secure compliance in high risk foundary industry sufficient); *Milton Morris* v. *Department of Labor*, S.D. Ill., No. 77-5068, decided September 20, 1977.

[3]29 U.S.C. 657(f)(1). See, *e.g., Matter of Gilbert and Bennett Manufacturing Company*, N.D. Ill., No. 77-C-856, decided April 12, 1977, appeal pending, C.A. 7, No. 77-1459.

individual field officers' discretion to inspect and must run a criminal gauntlet even to determine the inspection's necessity and scope, and where there is no showing that a warrant requirement would hamper meaningful enforcement. See 387 U.S. at 531, 532-534, 543, 545. Read in the light of subsequent decisions, those cases mean that the validity of particular warrantless inspection programs must be determined "on a case-by-case basis" (387 U.S. at 546) which properly weighs occupants' legitimate expectations of privacy in the subjects regulated and the areas to be inspected, against the scope of the authorized intrusion, the danger of institutionalized abuse, the extent to which warrants issued under administrative cause standards would provide appreciably more protection than that afforded by the statutory program itself, and any express congressional finding that a limited warrantless inspection authority is necessary—and hence "reasonable"—to effectuation of the particular statutory program. *E.g., Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. at 76-77 (opinion of the Court), 78-79 (Burger, C.J., concurring in relevant part), 80-81 (Black, J., same); *Biswell, supra,* 406 U.S. at 316-317; *Cady* v. *Dombrowski,* 413 U.S. 433, 439-442; *South Dakota* v. *Opperman,* 428 U.S. at 367-368, 370 n. 5, 372-376 (opinion of the Court), 382-384 (Powell, J., concurring); *United States* v. *Martinez-Fuerte,* 428 U.S. at 555, 559-562, 564-566.

The opinion below, and the other district court opinions upon which appellee relies, do not, however, even attempt to identify the interests pertinent to this balancing process, let alone undertake to balance them. For the reasons stated in our opening brief, we submit that a proper application of that analytical balancing process to the important statutory inspection program at issue here should persuade this Court to uphold it.

CONCLUSION

For the foregoing reasons and for those in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

CARIN ANN CLAUSS,
Solicitor of Labor,
Department of Labor.

DECEMBER 1977.

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